SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 877

NATHANIEL PRESLEY DAVIS

Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHARLES FULLER BLANCHARD
8th Floor Wachovia Bank Bldg.
Raleigh, North Carolina

IRVIN B. TUCKER, JR.
8th Floor Wachovia Bank Bldg.
Raleigh, North Carolina

Counsel for Petitioner

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

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Nathaniel Presley Davis, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on November 23, 1966, in this proceeding.

CITATION TO OPINION BELOW

The original opinion of the Court of Appeals, dated November 23, 1966, has not been reported to date. The majority opinion appears in the Appendix hereto at page 1A. The minority opinion appears in the Appendix at page 11A.

JURISDICTION

The judgment of the Court of Appeals is dated November 23, 1966, and was entered on the same date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Is the Government barred by collateral estoppel from using the identical witnesses and substantially the same testimony used in a former trial in which the defendant was acquitted to convict the defendant in this action when the same issues were involved in both trials?

2. Is the doctrine of collateral estoppel limited in its application to seriatim prosecution?

STATEMENT OF CASE

Jurisdiction of the District Court of the Eastern District of North Carolina was invoked because petitioner was charged with violations of the Federal Internal Revenue Act.

The petitioner, Nathaniel Presley Davis, along with five other persons, was charged in a five count bill of indictment. All counts alleged offenses on September 1, 1964, and all of the defendants were charged in each and every count of the bill of indictment. R. P. 8

The first count of the bill of indictment charged the petitioner and his co-defendants with possession, custody and control of a still and distilling apparatus for the production of distilled spirits set up without having the same registered as required by law in violation of Title 26 USC Section 5179.

The second count of the bill of indictment charged the petitioner and his co-defendants with having worked at a distillery for the production of distilled spirits, on which no sign was placed and kept in the manner and form required by law in violation of Title 26 USC Section 5180.

The third count of the bill of indictment charged the petitioner and his co-defendants with having made and fermented and caused to be made and fermented mash, wart, or wash, fit for distillation and for the production of

distilled spirits on the premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits in violation of Title 26 USC Section 5601(a)(7).

The fourth count of the bill of indictment charged that the petitioner and his co-defendants did unlawfully possess property intended for use in violation of the provisions of Chapter 51 of Title 26 United States Code of Regulations issued pursuant thereto in violation of Title 26 USC Section 5686(a).

The fifth count of the bill of indictment charged the petitioner and his co-defendants with having removed, deposited and concealed and were concerned in removing, depositing and concealing non-taxpaid whiskey in respect whereof a tax is imposed with intent to evade and defeat the assessment or collection of said tax by the United States of America in violation of Title 26 USC Section 7206(4).

The petitioner was arraigned on October 27, 1964, and entered a plea of not guilty to each and every count of the bill of indictment and requested a jury trial. R. p. 17.

The petitioner was tried in the United States District Court for the Eastern District of North Carolina in Raleigh, N. C., at a term of court commencing March 2, 1964, and on March 5, 1964, the jury returned a verdict of not guilty as to counts one, three, four, and five, but was unable to agree on a verdict as to count two. R. p. 17.

At the first trial the judge charged the jury that the petitioner Davis had presented an alibi that he was not present and if upon consideration of all the evidence the jury should have a reasonable doubt that the petitioner Davis was present at the time and place the alleged offenses were committed, the jury should acquit the petitioner Davis. Tr. p. 127, 128, first trial.

At the first trial the court charged the jury that under the statutory presumptions of 26 USC Section 5601(b)(1) and (3), they could find the petitioner guilty of counts one and three, if they found that he was present at the still. Tr. pp. 128-132; 134-135 first trial.

A mistrial was declared as to this petitioner as to count two of the bill of indictment. R. p. 17. The other defendants were disposed of by conviction or guilty plea at that term of court except the defendant Goss who appealed his conviction on the second and fifth counts and sentence to the Fourth Circuit Court of Appeals where his conviction was affirmed.

On June 14, 1965, the petitioner filed and entered a motion and plea in bar. R. p. 13.

On June 15, 1965, the Honorable John D. Larkins, Jr., denied the petitioner's motion and plea in bar. R. p. 20A.

On March 2, 1966, the petitioner was again tried in the United States District Court for the Eastern District of North Carolina on the second count of the bill of indictment. At the second trial the government placed the identical witnesses used in the first trial on the stand and their testimony was substantially the same as that given by the same witnesses in the first trial. R. p. 17, Appendix p. 11A note 1.

It was stipulated before any of the government's evidence was offered that all of the government's questions and all of the government's witnesses' answers were deemed objected to upon the grounds of collateral estoppel. Tr. p. 2 second trial.

At the close of the government's evidence and at the close of all of the evidence the petitioner Nathaniel Presley Davis moved (1) for dismissal of the action upon the grounds of collateral estoppel (2) that all the government's evidence be stricken as incompetent because of collateral estoppel and the motions were overruled. Tr. p. 82 second trial.

The jury returned a verdict of guilty as charged in the second count of the bill of indictment and the Judge on March 2, 1966, rendered judgment against petitioner Nathaniel Presley Davis committing him to the custody of Attorney General or his authorized representative for imprisonment for one year pursuant to the provisions of Title 18 USC Section 3651, petitioner to be committed to a jail-type or treatment institution for a period of six months and pay a fine of $500 and it was further adjudged that execution of the remainder of the prison sentence be suspended and the petitioner placed on probation for a period of three years under general conditions as recorded in the Clerk's office and a special condition that he pay the fine imposed under the supervision of the probation department, probation period to begin at the expiration of the active prison sentence. R. p. 17.

On March 2, 1966, the petitioner Nathaniel Presley Davis duly entered a notice of appeal from the aforesaid judgment entered against him and the sentence imposed to the Circuit Court of Appeals for the Fourth Circuit. R. p. 18.

The majority of the Fourth Circuit Court of Appeals affirmed the judgment of this district court, Appendix p. 1A. Judge Bell in a well reasoned opinion dissented, Appendix p. 11A.

Relevant Facts

WITNESS JOHN J. KEARINS, FIRST TRIAL

At the first trial witness John J. Kearins, testified that on September 1, 1964, he and other officers were observing a distillery in Youngsville Township, Franklin County, North Carolina about 50 yards distance through a 20 power telescope located in the woods and that distillery was in operation. Tr. pp. 3, 4.

Witness Kearins further stated that he saw the co-defendant Aubrey Goss at 5:15 p.m. through the telescope. Tr. p. 10, and about 5:20 p.m. he saw the petitioner Nathaniel Presley Davis bent over a row of fermenter barrels. Tr. p. 11. That he had known the petitioner Nathaniel Presley Davis for about ten years. Tr. p. 11. That the distillery was raided at about 5:45 p.m. and that Aubrey Goss, "June" Cates, John Robert Blalock, Lonnie Warren Harrison, and Charles Leonard Johnson were arrested at the distillery and that one man escaped. Tr. pp. 12, 13.

WITNESS JOHN J. KEARINS, SECOND TRIAL

At the second trial the witness Kearins testified that on September 1, 1964, he saw the petitioner Nathaniel Presley Davis whom he had known for more than 10 years at an unregistered distillery in Youngsville Township. The distillery was located in the woods in Franklin County and that he was observing from approximately 50 yards distance with a 20-power telescope and shortly after 5:15 p.m. he saw Davis and another man bending over a row of barrels in the distillery yards. Tr. pp. 3-4.

That petitioner Davis was not arrested until September 8, when he was arrested at the Alcohol and Tobacco Office in Raleigh. Tr. p. 6. That the warrant for Davis was not taken out until September 3, 1964, which was two days after the still raid. Tr. pp. 7, 8.

That he had testified at the first trial and at the commissioners hearing that he was not positive that the person he saw was the petitioner Davis until he walked into the office of the A.T.T.D. on September 8, 1964, Tr. pp. 8, 9, 10, and that statement was still true.

WITNESS LEON S. SMITH, FIRST TRIAL

The witness Leon S. Smith testified at the first trial that on September 1, 1964, he was watching the distillery through a telescope back about 50 yards from the still and at 5:15 p.m. he saw the defendant Goss, the petitioner Davis, the defendant Johnson and the defendant Cates walk into the distillery yard from the work way. Tr. p. 23. That at approximately 5:35 p.m. petitioner Davis and defendant Johnson went to the west side of the still yard to themselves, squatted down and were talking. Tr. p. 24. Leon S. Smith testified at the first trial that he saw Davis and Johnson pour some meal into some empty barrels. Tr. p. 24. The petitioner Davis went in a westerly direction from the still. He was the man that got away. Tr. p. 25.

The record of the first trial shows that the witness Smith testified that Cates and Johnson were pouring meal into the empty barrels however the cross-examination at the second trial divulges that this was a stenographic error and that the witness Smith testified at the first trial that Davis and defendant Johnson were pouring meal into the empty barrel. Tr. p. 24 first trial, Tr. pp. 31-37 second trial.

WITNESS LEON S. SMITH, SECOND TRIAL

The witness Leon S. Smith, testified at the second trial that on September 1, 1964, at approximately 5:15 p.m., he saw the petitioner Davis in a wooded area and at an unregistered distillery in Youngsville Township in Franklin County. That he was looking through a telescope mounted on a tripod approximately 50 paces from the still. Tr. p. 27.

That he saw the petitioner Nathaniel Presley Davis come into the still yard from the work way with other subjects. And at approximately a little after 5:20 p.m. on the same date he saw Nathaniel Presley Davis, through the aid of the telescope, take a foot-tub full of liquor and pour liquor into the liquor barrel which was under the shelter. Approximately 5 or 10 minutes later he also saw the defendant Davis and another subject over at the fermenter barrels pouring malt into the barrels. Tr. pp. 27, 28. That he saw the petitioner and another subject squatted down and talking just east of the fermenter barrels. That the petitioner was not apprehended. That after the raid they found non-taxpaid whiskey in the barrels. Tr. pp. 28, 29, 30.

WITNESS D. C. LAWSON, FIRST TRIAL

D. C. Lawson testified at the first trial that he was a member of the raiding party and that he observed a man flee to the west part of the distillery without a shirt. That he gave chase to this man and that he escaped. Tr. p. 69.

At the first trial, D. C. Lawson in his testimony enumerated all of the items found at the still and the items enumerated are almost identical with the fourth count of the bill of indictment and included 586 gallons of non-taxpaid whiskey described in the fifth count of the bill of indictment and 4,500 gallons of fermented mash described in the third count of the bill of indictment. Tr. p. 68. He further testified that he knew the petitioner Nathaniel Presley Davis prior to the date of the still raid. Tr. p. 83.

WITNESS D. C. LAWSON AT SECOND TRIAL

D. C. Lawson testified that at the second trial that he did not know the petitioner Davis at the time of the raid. Tr. pp. 76, 77. On cross-examination, D. C. Lawson admitted that the person who got away did not have a shirt on but tried to qualify his earlier statement that he had

given chase and directly contradicted the officer Zetts who had testified at the first trial that Cates did not have a shirt on. Tr. pp. 76, 77.

WITNESS MICHAEL D. ZETTS AT FIRST TRIAL

Michael D. Zetts testified at the first trial that June Cates who was in the process of chopping wood with a single bitted ax and had no shirt on at the time of the raid. Tr. p. 86.

WITNESS MICHAEL D. ZETTS AT SECOND TRIAL

Michael D. Zetts testified on cross examination at the second trial that he saw June Cates in the act of chopping some wood with a single bitted ax and that he had no shirt on. Tr. pp. 79-80.

WITNESS C. V. FAVRE AT FIRST TRIAL

C. V. Favre testified at the first trial that at approximately 5:15 p.m. he looked through the telescope in the general area there beneath the shelter and saw the petitioner Davis bending over looking in the liquor barrel. Tr. p. 99.

WITNESS C. V. FAVRE AT THE SECOND TRIAL

At the second trial, C. V. Favre testified that at 5:17 p.m. he saw the petitioner Davis at the distillery bending over the liquor catch tub under the shelter at the distillery and at that time he was looking through the telescope which was approximately 50 yards south of the distillery. It was a 60 millimeter 20 power telescope. Tr. p. 64.

REASONS FOR GRANTING WRIT

The majority of the Circuit Court of Appeals is in conflict with the decision of another court of appeals on the same matter and has decided a federal question in a way in conflict with an applicable decision of this court.

(1) The Government is barred by collateral estoppel from using the identical witnesses and substantially the same testimony used in a former trial in which the defendant was acquitted to convict the defendant in this action when the same issues were involved in both trials.

The point involved in this petition is not only important to the petitioner but to all of the citizens of our nation.

If the Government can take advantage of the prolific offenses that now exist in almost every criminal transaction and continue to prosecute a defendant in successive trials with the identical witnesses involving the same issue and substantially the same evidence until the defendant is either broken in health and finances or is convicted or is broken in health and finances and convicted, the double jeopardy clause of the Fifth Amendment to our Constitution will have been violated in spirit, if not literally violated, and one of our greatest heritages will have been by-passed.

The petitioner respectfully submits that the doctrine of collateral estoppel has arisen in our Jurisprudence to prevent the double jeopardy clause of the Fifth Amendment to our Constitution from being violated in spirit even though not violated in fact and that the decision of the majority of the Fourth Circuit Court of Appeals practically destroys the safeguard of the doctrine of equitable estoppel established by this Court in *Sealfon v. U. S.* 332 U.S. 574 and by the Second Circuit Court of Appeals in *United States v. Kramer,* 289 F.2d 909.

The decision of the majority of the Circuit Court of Appeals is in conflict with *U. S. v. Kramer,* 289 F.2d 909, which was a Second Circuit Court of Appeals case in which the defendant Kramer at a previous trial in the District Court of Connecticut was acquitted on counts charging burglaries in the Orange and Wilton, Connecticut, Post Offices respectively. At a later date the defendant was tried and

convicted on four counts of a bill of indictment, the first count charging conspiracy to enter the Wilton, Connecticut, Post Offices, the second count was similar to the first count except that it related to the Orange, Connecticut, Post Office. Count three charged a conspiracy to receive, conceal and retain with intent to convert to his own use money, vouchers, and things of value of the Post Office Department knowing the same to have been stolen. Count four charged the substantive count related to count three. The Government was permitted to offer testimony substantially identical to that given in the Connecticut trial, over the seasonable objections of the defendant.

The second Circuit Court of Appeals held in *U. S. v. Kramer,* supra, that the verdict in the prior prosecution barred the prosecution on counts one and two of the bill of indictment on the grounds of collateral estoppel and at page 916 stated:

> "The very nub of collateral estoppel is to extend res judicata beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, . . . to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; BUT IT MAY NOT PROVE THE NEW CHARGE BY ASSERTING FACTS NECESSARILY DETERMINED AGAINST IT ON THE FIRST TRIAL, NO MATTER HOW UNREASONABLE THE GOVERNMENT MAY CONSIDER THAT DETERMINATION TO BE."

In *United States v. Kramer,* supra, at page 915, the Second Circuit further said:

> "Considering the matter in a practical frame and viewed with an eye to all the circumstances of the proceedings, as the Supreme Court has directed, Sealfon v. United States, supra, 332 U.S., at page 579, 68 S. Ct. at page

240, it would seem rather plain that the admission of evidence showing Kramer's offenses charged in the first indictment violated the rule, also stated in Sealfon, 332 U.S. at page 578, 68 S. Ct. at page 239, that the Connecticut verdict 'OPERATES TO CONCLUDE THOSE MATTERS IN ISSUE WHICH THE VERDICT DETERMINED THOUGH THE OFFENSES BE DIFFERENT'."

The Second Circuit Court of Appeals in *U. S. v. Kramer,* supra, at page 916, also stated:

"More important, to permit the government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the government from the extensive catalog of crimes furnished it in the criminal code would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the fifth amendment . . . and still longer before the proliferation of statutory offenses deprived it of so much of its effect."

The Second Circuit in *U. S. v. Kramer,* supra, at page 914, further stated:

"The Government proved the fact of the burglaries and the extent of the damages and theft in thoroughness and detail. THE ISSUE FOR THE JURY WAS NOT WHETHER JOBS HAD BEEN DONE BUT BY WHOM."

Charges in count three and four of the bill of indictment in *U. S. v. Kramer,* supra, were not dependent upon Kramer being a participant in the burglaries and therefore the Second Circuit Court of Appeals did not order a judgment of acquittal as to Kramer on those two counts.

In the case of *Sealfon v. U. S.,* 332, U.S. 575, Sealfon was prosecuted for conspiring with Greenberg and found

not guilty. He was then prosecuted on the substantive count and convicted. This court reversed the conviction because "the core of the prosecutor's case in each case was the same." The conviction on the second trial was reversed even though there was additional evidence that improved the case. This court stated that in both trials it was essential to prove that Sealfon wrote a letter to Greenberg pursuant to an agreement and that the second trial was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was at the first trial adjudicated to be nonexisting and that this could not be done by the prosecution.

It is respectfully submitted that in both the first and second trials of the petitioner his guilt or innocence depended upon the identity of him as the person seen at the distillery pouring meal or malt into the empty barrel and who escaped and was not apprehended on the afternoon of the raid. The overwhelming importance of the issue of the petitioner's identity is shown by the charge the court in the first trial in which the trial judge charged the jury that the defendant Davis had presented an alibi that he was not present and if upon consideration of all the evidence the jury should have a reasonable doubt that the defendant Davis was present at the time and place that the alleged offenses were committed, the jury should acquit the defendant Davis. Tr. pp. 127, 128 first trial. Also at the first trial the court charged the jury that under the statutory presumptions of 26 USC Section 5601(b)(1) and (3) they could find the defendant guilty of counts one and three if they found that he was present at the still. Tr. pp. 128-132; 134-135 first trial.

Judge Bell in his excellent dissenting opinion clearly sets forth how the majority opinion of the Circuit Court disregarded *Sealfon v. U. S.* supra, and *U. S. v. Kramer,* and instead of ascertaining the "nub" or "core" of the case went into meticulous analysis of the separate elements of the

several crimes involved in making illicit whiskey. Judge Bell Appendix pp. 12A, 13A stated:

> "Notwithstanding the majority's meticulous analysis of the separate elements of the several crimes involved in making illicit whiskey, the one real issue before the jury was clearly and simply a question of identification. While it is true that the testimony of the five government agents regarding what they observed at the still varied in minor particulars from the first to the second trial, the government's entire case against Davis in both trials consisted of the agents' observations through a telescope on a single occasion. The majority opinion asserts that the jury reasonably may have been convinced of the agents' identifications of Davis since the four counts of which he was acquitted required a finding of something more than mere presence. The majority opinion fails to point out that presence alone was enough to convict the defendant on two of the four counts of which he was acquitted, and the district court carefully instructed the jury to that effect. Although there is a remote possibility, of course, that the jury may have believed that Davis was present but not guilty of any of the four counts of which they acquitted him, it is highly improbable in view of the instruction as to the statutory presumptions created by presence. It is almost always possible in a criminal case to hypothesize alternative cases for a jury verdict, and to do so in the meticulous manner of the majority opinion rather than to look at the evidence as a whole is to vitiate, to a great degree, the doctrine of collateral estoppel as applied to criminal cases."

Judge Bell in his well reasoned dissenting opinion further pointed out that the test to be applied in determining what issue has been previously found for the defendant is the test used by the second Circuit in *U. S. v. Kramer,* supra, and by this court in *Sealfon v. United States,* supra, that

"The core of the prosecutor's case was in each case the same." Appendix pp. 14A, 15A.

The dissenting opinion of Judge Bell also pointed out that the majority has mistakenly applied the civil rule test for applying collateral estoppel. The civil rule test requires extreme caution in making a determination of collateral estoppel. In a criminal case the liberty of the defendant is at stake, not merely his rights and liabilities. In a criminal case the predominating policy for applying collateral estoppel is the policy of the double jeopardy clause of the Fifth Amendment — to prevent harassment of the defendant and his being subjected to a second trial. Appendix p. 14A.

Applying the principles of Second Circuit in *U. S. v. Kramer* and of this court in *Sealfon v. U. S.*, Judge Bell in his dissenting opinion Appendix pp. 14A, 15A well stated:

> "It seems to me beyond quibble that the 'core' of the Government's case in both trials of Davis was the question of whether Davis was present at the still and that the jury in acquitting Davis on four of the five counts in the first trial decided that issue in the defendant's favor. That trial was a full and fair hearing and a definitive adjudication of the matter. . . . "

The witnesses for the government in both trials were identical and so substantially the same in their evidence that the Government conceded in its brief on appeal in the Circuit Court that the testimony of the witnesses was substantially the same. Appendix p. 11A. Note 1 and the fact that the witnesses testimony was substantially the same was for the purpose of appeal was conceded by the majority opinion. Appendix p. 5A.

The majority opinion of the Fourth Circuit Court of Appeals on this point is not only erroneous but is in conflict with the decision of the court of appeals of the second circuit on the same matter and the majority opinion has decided a

federal question in a way in conflict with an applicable decision of this court and in order to settle the conflict between the Second Circuit Court of Appeals and the Fourth Circuit Court of Appeals and to correct the decision of the majority of the court in this cause on a federal question in a way which conflicts with an applicable decision of this court, a review of the decision below is a requisite.

(2) The doctrine of collateral estoppel is not limited in its application to seriatim prosecution.

The majority opinion Appendix pp. 9A, 10A suggests that the doctrine of collateral estoppel applies only to seriatim prosecution and does not apply where all of the offenses are contained in the same bill of indictment, and states that unless seriatim prosecution is involved in collateral estoppel it is "certainly less compelling."

The majority opinion on this point is in direct conflict with the Ninth Circuit Court of Appeals in *Cosgrove v. U. S.*, 224 F.2d 146, wherein the appellants were tried on a bill of indictment which contained numerous counts and the trial resulted in acquittals on counts one and two and mistrials as to the remaining counts. At the second trial the defendant Cosgrove was convicted on counts against him which had resulted in a mistrial in the former case and his co-defendant Doyle was also convicted on counts which had also resulted in a mistrial in the former trial. The Ninth Circuit Court of Appeals on the grounds of collateral estoppel reversed both decisions and relied heavily upon the authority of *Sealfon v. U. S.*, supra.

The petitioner respectfully submits that the suggestion of the majority of the circuit court that the doctrine of collateral estoppel applies only to seriatim prosecution and its holding that the doctrine of collateral estoppel is "certainly less compelling where all of the offenses were initially joined in the bill of indictment," not only is in conflict with the ninth

circuit in *Cosgrove v. U. S.*, supra, but is in conflict with the holding of the second circuit in *U. S. v. Kramer*, supra, and the decision of this court in *Sealfon v. U. S.*, supra, where it was established that if the "core" of the prosecutions' case was the same in both trials the government is barred by collateral estoppel from prosecution of the second trial.

The "core" test is equitable in its nature and does not include technical considerations.

The majority decision of the circuit court of appeals of the Fourth Circuit on this point is not only erroneous but is in conflict with the decisions of the Second and Ninth Circuits on the same matter and has decided a federal question in a way in conflict with the applicable decision of this court. And a review of the decision below is a requisite.

CONCLUSION

For the foregoing reasons a writ of certiorari to review the judgment of the majority of the court of appeals for the Fourth Circuit should issue.

Respectfully submitted,
CHARLES FULLER BLANCHARD
8th Floor Wachovia Bank Bldg.
Raleigh, North Carolina

IRVIN B. TUCKER, JR.
8th Floor Wachovia Bank Bldg.
Raleigh, North Carolina

Counsel for Petitioner